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No. 04-278

Supreme Court, U.S.
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In The

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Respondent, Jessica Gonzales, brought an action under 42 U.S.C. § 1983 in the United States District Court for the District of Colorado against the Petitioner and three of its police officers. Ms. Gonzales' complaint alleged that the due process rights of her and her three (now deceased) daughters under the Fourteenth Amendment to the United States Constitution had been violated by the individual police officers because of their failure and refusal to enforce a restraining order against Ms. Gonzales' estranged husband. The complaint also asserted a claim against the Petitioner based on its failure to train its law enforcement officers properly, and its maintenance of an official custom or policy of failing and refusing to respond properly to restraining order violations.

Ms. Gonzales alleged in her complaint (Pet. App. 124a-130a) that her estranged husband, who had a history of suicidal threats and erratic behavior, abducted her children from the front yard of their home in violation of a permanent restraining order and eventually murdered them. With great specificity, Ms. Gonzales detailed in her complaint how, over a five-hour span, she repeatedly asked the Castle Rock police officers to enforce the restraining order against her estranged husband and return the children to her, and how they failed and refused to do so, despite knowing exactly where Mr. Gonzales and the children were, and despite a state statute requiring them to take certain action to enforce the restraining order.

Before any answer to the complaint was filed, the district court dismissed the complaint on a motion made under Fed. R. Civ. P. 12(b)(6), holding that neither the procedural nor substantive components of the Due Process

Clause provided the basis for a cognizable claim against the Petitioner or any of the individual officers. Pet. App. 113a-123a. A panel of the Tenth Circuit Court of Appeals unanimously affirmed the district court's ruling as to the substantive due process claim, but reversed the district court's determination that Ms. Gonzales failed to state a cognizable claim for the violation of her and her daughters' procedural due process rights. On rehearing *en banc*, the Tenth Circuit Court of Appeals held that Ms. Gonzales was entitled to proceed against the Petitioner on her procedural due process claim, but further held that the individual police officers were entitled to qualified immunity as to that claim. Pet. App. 1a-44a.

ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI.

No conflict exists among the judicial circuits of the United States with respect to the precise issue addressed by the Tenth Circuit: namely, "whether a court-issued domestic restraining order, whose enforcement is mandated by state statute, creates a property interest protected by the due process clause of the Fourteenth Amendment." Pet. App. at 2a. In fact, the Tenth Circuit's decision is the *sole* reported circuit court opinion on the issue. Moreover, the Tenth Circuit's opinion is in full accord with the only two reported district court decisions to have addressed the issue, *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257 (E.D. Pa. 1990) and *Siddle v. City of Cambridge*, 761 F. Supp. 503 (S.D. Ohio 1991).

Petitioner's argument that the Tenth Circuit's opinion "severely undermines the guiding principles of" *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), Pet. at 13, is misplaced. The procedural due process issue addressed by the Tenth Circuit is distinct from the substantive due process claim addressed by this Court in *DeShaney*. The Tenth Circuit correctly noted:

> However, *DeShaney* limited its constitutional review to whether a substantive due process right to government protection exists in the abstract, and specifically did not decide whether a state might afford its citizens "an 'entitlement' to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation" under *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

Pet. App. at 9a (quoting *DeShaney*, 489 U.S. at 195, n.2). Accordingly, the Tenth Circuit proceeded to utilize the "familiar rubric of *Roth*" to analyze whether Respondent's court-issued restraining order, coupled with certain state statutory provisions, "creates a *Roth*-type entitlement subject to procedural due process protections." Pet. App. at 12a-13a.

The Tenth Circuit's analysis in this regard merely adopted this Court's long-respected *Roth* doctrine, which has successfully stood the test of time. Certainly, the proper invocation of a long-standing and oft-applied doctrine of this Court in a factually novel context is not a compelling reason to grant certiorari. There is absolutely no decision – state or federal, reported or unreported – that would suggest a different result or lead to any uncertainty in the law being created by the Tenth Circuit's

decision. Under these circumstances, there is no compelling reason for this Court to grant certiorari.

II. NO CIRCUIT CONFLICT EXISTS.

A. Petitioner Mischaracterizes the Issue Actually Decided by the Tenth Circuit.

In alleging a circuit conflict, Petitioner loses sight of the issue actually decided by the Tenth Circuit. The Tenth Circuit's opinion emphasized at length the fact that, in reaching its conclusion that Respondent had a protected interest in enforcement of the order which was cognizable under *Roth*, it was relying on the specific language in the restraining order itself, *coupled with* certain statutory language regarding mandatory enforcement of the order. Pet. App. at 16a-29a. The Tenth Circuit *never* held that the statutory language mandating enforcement of the restraining order in and of itself created any protected property interest. In fact, the Tenth Circuit stated just the opposite:

> In this case, the Colorado statute alone does *not* create the property interest. Rather, the court-issued restraining order, which specifically dictated that its terms must be enforced, *and* the state statute commanding the same, establish the basis for Ms. Gonzales' procedural due process claim.

Pet. App. at 12a, n.5 (emphasis added).

This point recently was emphasized by the Tenth Circuit in *Jennings v. City of Stillwater,* 2004 WL 2044312 (10th Cir. Sept. 14, 2004). In *Jennings,* the plaintiff asserted a violation of her procedural due process rights,

arguing that an Oklahoma statute created a constitutionally-protected property interest in "not being discouraged from prosecuting" a sexual assault claim. *Jennings* at *6. Writing for a unanimous panel, Judge McConnell (who dissented in the case at bar and was joined in *Jennings* by Judge Kelly, who also dissented in the present case) stated:

> Relying on the panel opinion in, *Gonzales v. City of Castle Rock*, 307 F.3d 1258, 1264 (10th Cir. 2002), Plaintiff argues that when regulatory language in a statute "is so mandatory that it creates a right to rely on that language," an entitlement is created that "[cannot] be withdrawn without due process." *Id., quoting Cosco v. Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam). Plaintiff argues that Okla. Stat. tit. 22, § 40.3A entitles her not to be discouraged from prosecuting the offenders, and that Detective Buzzard deprived her of this right. Whatever the force of this argument under our *Gonzales* holding as it existed at the time Plaintiff filed her appeal, it is foreclosed by our subsequent en banc opinion, issued just before this case was argued. *See Gonzales v. City of Castle Rock*, 366 F.3d 1093 (10th Cir. 2004) (en banc) [hereinafter *Gonzales II*]. In *Gonzales II* we analyzed due process claims brought against local police officers who failed to enforce a court-issued restraining order. Both the restraining order and the relevant state statute contained language that required police to arrest restrained persons who were in violation of the order. The statute provided: "A peace officer shall arrest, or, if arrest is impractical . . . seek a warrant for the arrest of the restrained

person." *Gonzales II*, 366 F.3d at 1097, 1104. While the original panel opinion left open the possibility that the mandatory statutory language, standing alone, could create an interest enforceable through the due process clause, that position was rejected by the en banc Court. The en banc Court characterized Ms. Gonzales' property interest as the product of a court-issued restraining order, coupled with statutory language requiring enforcement. *See id.* at 1101-05. The Court disclaimed the theory Plaintiff now urges:

> In this context, many of the cases cite[d in the] dissent are inapposite to the specific facts and legal arguments raised in the present case because the courts in those cases rejected the argument that statutes detailing procedures regarding general child abuse investigations and reporting could *alone* create a protected interest in such services. [citing cases] In this case, *the [state] statute alone does not create the property interest.* Rather, the court-issued restraining order, which specifically dictated that its terms must be enforced, and the state statute commanding the same, establish the basis for Ms. Gonzales' procedural due process claim.

Id. at 1101 n.5 (emphasis added).

Similarly, after addressing the state's statutory regime, the Court dropped a footnote stating:

> While we asked the parties to brief whether a protected property interest was created by the mandatory terms and objective predicates laid out in [the state statutes], we do not so hold. Rather, we conclude that the statute's force derives from the existence of a restraining order issued by a court on behalf of a particular person and directed at specific individuals and the police.

Id. at 1104 n.9.

> Here, unlike *Gonzales II,* Plaintiff's asserted property interest rests solely on the language of the Oklahoma statute. There was no court order specifically applying the protections of the statute to her. The procedural due process claim can thus not be maintained.

Jennings, at *7-9. In this regard, the Tenth Circuit's opinion in the present matter must be read as reflecting a very fact-specific issue that is unlikely to recur frequently.

B. The Circuit Conflict Alleged by Petitioner is Illusory.

All of the cases relied upon by Petitioner in support of an alleged circuit conflict are readily distinguishable. None of those cases involved a restraining order violation, let alone the violation of a court order of any kind. Each of those cases addressed arguments that a violation of a state statute *alone* created some kind of protected property interest. *See, e.g., Jones v. Union County,* 296 F.3d 417 (6th Cir. 2002) (alleged failure by sheriff to serve *ex parte* protection order); *Doe by Fein v. District of Columbia,* 93 F.3d 861 (D.C. Cir. 1996) (alleged violation of District of Columbia statute regarding procedures for investigating child abuse and neglect); *Doe by Nelson v. Milwaukee County,* 903 F.2d 499 (7th Cir. 1990) (alleged violation of

Wisconsin statute requiring social services department to investigate a report of child abuse within 24 hours); *Doe v. Hennepin County,* 858 F.2d 1325 (8th Cir. 1988) (alleged violation of Minnesota statute regarding child abuse investigations); *Pierce v. Delta County Dep't of Social Servs.,* 119 F. Supp. 2d 1139 (D. Colo. 2000) (alleged failure to report child abuse allegations, as required by Colorado statute); *Semple v. City of Moundsville,* 963 F. Supp. 1416 (N.D.W. Va. 1997) (alleged failure to advise of certain rights of domestic abuse victim or serve temporary protective order in violation of West Virginia statute).[1] In the present case, the Tenth Circuit examined whether the terms of a court-issued restraining order *and* a statute mandating its enforcement created a property interest. None of the cases cited by Petitioner contain an analogous fact pattern or analysis. Moreover, as noted above, the Tenth Circuit in its recent *Jennings* opinion made clear that its opinion at bar is not to be construed as sanctioning the creation of a property interest out of a statutory mandate alone.

In summary, there is no real circuit conflict nor any real likelihood that one will arise. The alleged conflict urged by Petitioner readily is resolvable on factual grounds, does not involve deciding between differing legal

[1] Most of these cases have arisen in the context of child abuse allegations, which is not the factual context of the case at bar. Furthermore, *Jones* specifically addressed the issue of substantive rather than procedural due process. "While *Jones* rightly rejected the plaintiff's reliance on *Roth* for the proposition that violation of a state statute could give rise to a substantive due process claim, it did not provide any further discussion on whether the state statute at issue had in fact created a protected property interest subject to procedural due process protections." Pet. App. at 10a, n.4 (citing *Jones*, 296 F.3d at 429).

views, and does not have any viable importance for the proper administration of the law. The Tenth Circuit's opinion at bar is in full accord with other cases and does not present any important, troublesome or persistent conflict in the law.

III. THE TENTH CIRCUIT DID NOT DECIDE ANY UNSETTLED IMPORTANT QUESTION OF FEDERAL LAW REGARDING THE KIND OF PROCESS DUE A HOLDER OF A RESTRAINING ORDER IN COLORADO.

In addressing the question of what process was due to Respondent, the Tenth Circuit applied the long-standing balancing test required by *Mathews v. Eldridge,* 424 U.S. 319 (1976). Curiously, Petitioner does not take issue with the applicability of this test or the method by which it was employed by the Tenth Circuit. Rather, Petitioner asks this Court to grant certiorari to "fashion procedures that must be implemented before a state or its employees *fail* to act." Pet. at 25. Presumably, this task would involve the Court revisiting *Mathews* and developing new and specific procedural guidelines for municipalities, but Petitioner does not provide any compelling reason for doing so. In any event, given the limited nature and narrow contents of the Tenth Circuit's ruling, such a broad issue would not be ripe for this Court's review.

Petitioner makes a generalized claim that the Tenth Circuit failed to provide any guidance as to the kind of process due and has imposed upon the district courts the burden of designing procedures. This simply is not the case. The Tenth Circuit applied the *Mathews* analysis to the particular facts of this matter, and expressly held that the Respondent was entitled to the following process:

> The statute directs police officers to determine whether a valid order exists, whether probable cause exists that the restrained party is violating the order, and whether probable cause exists that the restrained party has notice of the order. If, after completing these three basic steps, an officer finds the restraining order does not qualify for mandatory enforcement, the person claiming the right should be notified of the officer's decision and the reason for it.

Pet. App. at 40a (citations and footnotes omitted). The Tenth Circuit provided Petitioner and other municipalities in Colorado with a specific process to follow when presented with an alleged restraining order violation. Petitioner does not contend that either the Tenth Circuit's conclusion or its analysis in this regard was wrong. No compelling reason exists for the Court to grant certiorari as to any issue regarding the kind of process due under the novel fact pattern of the present matter.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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